141 U.S.
141-690

RECORD, CASE No. 14,891.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 1417.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN ROBERTS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED OCTOBER 12, 1891.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 2, 1891.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between John Roberts, plaintiff, and Chicago, St. Paul, Minneapolis and Omaha Railway Company, defendant, a manifest error hath happened, to the great damage of the said defendant, as is said, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 30th day of May next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day April, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the 116th.

U. S. Circuit Court Seal, Third Division, Dist. of Minnesota.

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States of America for the District of Minnesota,
By LOUISE B. TROTT,
Deputy Clerk.

1½ [Endorsed:] Ent. No. 842. E. law. United States circuit court, district of Minnesota. John Roberts *vs.* C., St. P., M. O. R'y Co., defendant. Writ of error. Filed April 30th, 1891. Oscar B. Hillis, clerk.

UNITED STATES OF AMERICA, *District of Minnesota,* } *ss:*

The answer of the judges of the circuit court of the United States for the district of Minnesota, in the eighth circuit, in within writ mentioned.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States of America,

within mentioned, in a certain schedule to this writ annexed, as within it is commanded.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in the district of Minnesota, this — day of ——, in the year of our Lord one thousand eight hundred and —, and of the Independence of the United States the one hundred and — year.

—— ——,
Clerk U. S. Circuit Court, Dist. of Minnesota.

2 UNITED STATES OF AMERICA:

JOHN ROBERTS, Plaintiff,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Defendant.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota, of the January term, A. D. 1891, of said court, held in the city of St. Paul, in said district, in the year 1891.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this 3rd day of November, A. D. 1890, came the plaintiff above named, by his attorney, and filed in the clerk's office of said court his return from the district court of Scott county in words and figures as follows, to wit:

3 STATE OF MINNESOTA, *County of Scott,* } *ss:*

District Court, Eighth Judicial District.

JOHN ROBERTS, Plaintiff,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Defendant.

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, which is hereto attached and herewith served upon you, and to serve a copy of your answer to said complaint on the subscriber, at his office, in the city of St. Paul, in the county of Ramsey, in said State, within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will, upon such failure, have the amount he is entitled to recover ascertained by the court or under its direction and take judgment for the amount so ascertained, together with the costs and disbursements herein.

Dated —— —, A. D. 1890.

J. L. MACDONALD,
Plaintiff's Attorney, St. Paul, Minn., Globe B'ld'g.

4 STATE OF MINNESOTA, } ss:
County of Scott, }

District Court, Eighth Judicial District.

JOHN ROBERTS, Plaintiff,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Defendant.

The above-named plaintiff for complaint against the said defendant herein respectfully shows to the court and alleges—

That said defendant is and for more than one year last past has been a corporation duly organized under and pursuant to the laws of the State of Wisconsin and was duly authorized by the laws of the State of Minnesota to acquire, own, and operate the railroads hereinafter named, and it was and is for the purpose of this action a domestic corporation of the said State of Minnesota under and pursuant to the laws thereof, and that it was during that time the owner of a certain railroad extending from the city of St. Paul, in said State, and through said State of Minnesota to Sioux City, in the State of Iowa, which railroad was formerly named the St. Paul and Sioux City railroad, which was and is now known as the Western Division of the Chicago, St. Paul, Minneapolis and Omaha Railway Company of defendant, together with the tracks, rolling stock,
5 cars and locomotives, water tanks and other appliances thereunto belonging, and then and there operated said railroad and was a carrier of freight and passengers thereupon for hire, and that it then and there became and was the duty of defendant to procure and have a good and safe and properly constructed and located railroad and tracks, water tanks, locomotives, machinery, and other appliances and apparatus to operate said railroad.

That on the 7th day of March, A. D. 1890, the said plaintiff was employed by said defendant as a fireman upon one of its said locomotives at and for a certain hire and reward agreed upon by the parties hereto in that behalf, and on that day was so employed upon said locomotive at the village of St. James, in the county of Watonwan, in the State of Minnesota, the said locomotive being then and there used for the purpose of hauling trains of freight cars from the city of St. Paul to the village of St. James and from said village of St. James to said city of St. Paul, and that said plaintiff had only been engaged as fireman as aforesaid upon locomotives hauling trains from the city of St. Paul to the said village of St. James and back to St. Paul a short time, and did not, before the injury herein complained of, know or have notice of the defective and negligent construction and location of tracks and water tanks, as herein stated.

That the said defendant, in the construction of its said railroad and appliances thereto belonging, including its side tracks and water tanks thereunto belonging and connected therewith, and in the operation of its said railroad, engines, locomotives, and trains thereof,

conducted itself so carelessly, negligently, and unskillfully,
6 as hereafter stated, that by and through the carelessness, negligence, and default of said defendant and its servants it provided and suffered to be used an unsafe, defective, and improperly constructed railroad, and a side track, and a side track and a water tank used in connection therewith, at said village of St. James, and carelessly and negligently operated the same and injured this plaintiff, as hereinafter stated.

That in and at said St. James there is owned and operated by said defendant, as a part of its said railroad and appliance, a turn-table to turn or reverse locomotives and cars, and a side track leading from the main track of said railroad to said turn-table, and that near the point where this side track intersects the said main track there was and is a water tank, from which the locomotives on said railroad can there be supplied with water, and that the base or substructure of said water tank was about twelve feet square.

That the said carelessness, negligence, unskillfulness, and default of said defendant herein complained of consisted in this: That said water tank and said side track were constructed and located too near to each other and not more than two feet apart, and so negligently and carelessly constructed and located that in passing the same on said side track the side of the locomotives then and there used by said defendant and the tenders thereof and next thereto, including the one on which plaintiff was then so employed, would not be and was not more than four inches from said water tank and base or substructure thereof; and that on the
7 7th day of March, A. D. 1890, the said locomotive upon which the said plaintiff was then employed and engaged, as hereinbefore stated, was standing on said side track a short distance from said water tank, and after having been turned around and reversed upon said turn-table, with the engineer thereof and this plaintiff thereon, and that while so then and there upon said locomotive this plaintiff, in the line of his duty as a fireman thereof and the proper and necessary performance thereof, stepped out of the cab of said locomotive upon the rim or side of the tender and tank thereof and thereto attached to get some material called "waste" from the proper receptacle thereof to wipe off and clean said engines or portions thereof, and that immediately after so stepping out upon the rim of said tender and without any notice to said plaintiff, and before plaintiff could return into said cab or leave where he was then or escape therefrom or avoid being caught and injured, the said engineer, without knowledge of this plaintiff or notice to him or any fault or negligence upon the part of this plaintiff, in response to the orders of the conductor in charge, started and moved in said locomotive towards said main track, and thereupon and immediately thereafter this plaintiff was, by reason of the negligence herein mentioned, caught between said locomotive tender and tank attached thereto and said water tank and base or substructure thereof and was thereby and before he could escape caught between said tender and the said water tank and crushed, bruised, and wounded,

and he was otherwise severely injured, whereby he became
8 sick, sore, lame, and disordered and disabled and deformed and made to suffer great pain and has ever since been crippled and in pain and in suffering and disabled and deformed and unable to perform manual labor as he was prior to this injury or to earn a livelihood, and will be so disabled and deformed and unable to earn a livelihood as long as he lives because of said injury to him.

That to be properly constructed and located said water tank and base or substructure thereof and said side track should have been constructed and located at least five feet from each other and far enough apart and so constructed that there would have been not less than two feet between said water tank and base and substructure thereof and the side of any said locomotives or tenders thereof when passing said water tank.

That this plaintiff did not by his own fault or carelessness or negligence in any manner contribute to his being so injured, and the same was wholly caused by the negligence and carelessness of said defendant and its servants, as hereinbefore stated.

That this plaintiff is a young man in the prime of life, and immediately prior to his being injured, disabled, and deformed as aforesaid was in good health and able-bodied and without disability and capable of earning a livelihood, and was, when so injured, earning not less than seventy-five ($75) dollars a month.

That by reason of the facts hereinbefore stated this plaintiff has been damaged in the sum of thirty thousand ($30,000) dollars.

9 Wherefore he prays judgment herein for the sum of thirty thousand ($30,000) dollars and his costs and disbursements herein.

J. L. MACDONALD,
Att'y for Plaintiff, Globe B'ld'g, St. Paul, Minn.

STATE OF MINNESOTA, } ss:
County of Scott, }

John Roberts, being first duly sworn, upon oath says that he is the plaintiff in the foregoing within-entitled action; that he knows the contents of the foregoing complaint, and that the same is true of his own knowledge except as to matters stated on information and belief, and as to such matters he believes it to be true.

(Signed) JOHN ROBERTS.

Subscribed and sworn to before me this 13th day of October, 1890.

J. L. MACDONALD,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minnesota.*

Filed Nov. 1st, A. D. 1890.

JULIUS A. COLLER, *Clerk.*
W. F. WITT.

10 STATE OF MINNESOTA, }
County of Scott. }

In District Court, Eighth Judicial District.

JOHN ROBERTS, Plaintiff,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Defendant.

To the honorable the district court for said county of Scott:

Your petitioner, The Chicago, St. Paul, Minneapolis and Omaha Railway Company, respectfully shows to this court—

That the above-entitled action has been brought and is now pending in the court aforesaid by the plaintiff above named against your petitioner as sole defendant therein to recover from your petitioner alleged damages for alleged carelessness, negligence, and unskillfulness in the construction and location of certain structures and tracks of its railway, and other negligence, and that the said action is wholly of a civil nature; that the matter and amount in dispute in said action and suit exceeds, exclusive of interest and costs, the sum of value of two thousand ($2,000) dollars, all of which will more fully appear by the complaint in said action, to which reference is hereby made and which is hereby made a part hereof.

11 That the controversy in said action and suit is wholly between citizens of different States, and that your petitioner, the defendant therein, is a foreign corporation, and was at the time of the commencement of this suit, ever since has been, and still is a non-resident of the State of Minnesota, and was at said time, ever since has been, and still is a corporation duly created, organized, and existing under and by virtue of the laws of the State of Wisconsin, and that at all said times was and is now a citizen of the State of Wisconsin, having its principal office and place of business in the city of Hudson, in the State last named; that the plaintiff, John Roberts, prior to the commencement of said action and suit was, ever since has been, and still is a citizen of the State of Minnesota, and did and still does reside in and was and still is an inhabitant of the district of Minnesota, within which district is the county of Scott, the county in which said action and suit was brought and is now pending; that the time within which the defendant is required by the laws of the State of Minnesota and the rules of the said district court of the county of Scott, in the said eighth judicial district, to answer or plead to the complaint in said action has not expired.

That your petitioner has made and herewith files a bond, with good and sufficient sureties, for its entering in the circuit court of the United States for the district of Minnesota, third division, on the first day of its next session, a copy of the record in said action and suit, and for paying all costs that may be awarded by the

12 said circuit court if the said circuit court shall hold that the said suit was wrongfully or improperly removed thereto.

Wherefore your petitioner prays the court to accept this petition and said bond and to proce-d no further in said suit.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
By E. W. WINTER, *General Manager.*

J. H. HOWE,
S. L. PERRIN,
Attorneys for Petitioner.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

E. W. Winter, being duly sworn, says that he is an officer, to wit, the general manager, of The Chicago, St. Paul, Minneapolis and Omaha Railway Company, the corporation petitioner above named; that he has read the foregoing petition and knows the contents thereof, and that the same and all statements and allegations therein are true.

E. W. WINTER.

Subscribed and sworn to before me this 31st day October, A. D. 1890.

S. L. PERRIN,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minnesota.*

13 STATE OF MINNESOTA, } ss:
County of Scott, }

In District Court, Eighth Judicial District.

JOHN ROBERTS, Plaintiff,
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Defendant.

Know all men by these presents that we, the Chicago, St. Paul, Minneapolis and Omaha Railway Company, as principal, and E. W. Winter and Chas. W. Johnson, of St. Paul, Minnesota, as sureties, are held and firmly bound unto John Roberts in the penal sum of two hundred and fifty ($250) dollars, lawful money of the United States of America; the payment of which said sum, well and truly to be made unto the said John Roberts, his heirs and assigns, the above-bounden principal hereby binds itself, its heirs, successors, and assigns, and the said sureties hereby bind themselves, their heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31st day of October, A. D. 1890.

The condition of the above obligation is such that—

Whereas a certain suit brought on or about the 15th day of October, A. D. 1890, in the district court for the county of Scott,
14 in the eighth judicial district of the State of Minnesota, by the said John Roberts against the above-bounden principal,

The Chicago, St. Paul, Minneapolis and Omaha Railway Company, and the said suit is now pending in the court aforesaid and is removable into the circuit court of the United States for the district of Minnesota, third division, and the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, the sole defendant in said suit, intends to file its petition in the said district court, praying for the removal of said suit from the said district court to the said circuit court:

Now, therefore, if the said petitioner, The Chicago, St. Paul, Minneapolis and Omaha Railway Company, shall enter in the said circuit court of the United States for the district of Minnesota, third division, on the first day of its next session, a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court of the United States if said circuit court shall hold that that suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and effect.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
By E. W. WINTER, *General Manager.*
E. W. WINTER. [SEAL.]
CHAS. JOHNSON. [SEAL.]

Signed, sealed, and delivered in presence of—
S. L. PERRIN.
H. P. BARLOW.

15 STATE OF MINNESOTA, } ss:
County of Ramsey, }

E. W. Winter, to me known to be the general manager of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, the principal named in the foregoing bond, and to me known to be the person who executed the same, came personally before me this 31st day of October, A. D. 1890, and acknowledged the execution of the foregoing instrument to be his free act and deed and the free act and deed of the said principal; also came personally before me the said E. W. Winter and Chas. W. Johnson, to me well known to be the persons who executed the foregoing bond as sureties, and each acknowled- the same to be his free act and deed.

[NOTARIAL SEAL.] S. L. PERRIN,
Notary Public, Ramsey County, Minnesota.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

E. W. Winter and Chas. W. Johnson, being first duly sworn, doth say each for himself that he is one of the persons who signed the foregoing bond as surety; that he is a resident and freeholder of the State of Minnesota, and that he is worth the sum of five hundred ($500) dollars above his debts and liabilities and exclusive of property exempt from sale on execution.

E. W. WINTER.
CHARLES W. JOHNSON.

Subscribed and sworn to before me this 31st day of October, A. D. 1890.

16 [NOTARIAL SEAL.] S. L. PERRIN,
Notary Public, Ramsey County, Minnesota.

STATE OF MINNESOTA, } ss:
County of Scott, }

District Court, Eighth Judicial District.

I, Julius A. Coller, clerk of the district court, Scott county and State of Minnesota, do hereby certify that I have compared the foregoing paper-writing with the original summons and complaint, petition, and bond in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

[SEAL.] Witness my hand and the seal of said court, at Shakopee, this 1st day of Nov., A. D. 1890.

JULIUS A. COLLER,
Clerk of the District Court.

Return to circuit court.
Filed Nov. 3rd, 1890.

OSCAR B. HILLIS, *Clerk.*

17 And afterwards, to wit, on the same day, came the above-named defendant and filed its answer to the return of the plaintiff in the following words, to wit:

18 In the Circuit Court of the United States for the District of Minnesota, Third Division.

JOHN ROBERTS, Plaintiff,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Defendant.

The defendant above named, answering the complaint of the plaintiff herein, respectfully states and shows to the court:

First. The defendant admits that it is, and for more than one year has been, a corporation duly organized under and pursuant to the laws of the State of Wisconsin, and that it was duly authorized by the laws of the State of Minnesota to acquire, own, and operate railroads in said State, and that it owned at the time named in said complaint a certain railroad extending from St. Paul to Sioux City, in the State of Iowa, formerly called *called* the St. Paul and Sioux City railroad, and that it owned tracks, rolling stock, cars and locomotives, and water tanks thereunto belonging, and that it was a carrier of passengers and freight for hire.

Second. The defendant admits that on the 7th day of March, A. D. 1890, plaintiff was in its employ as a fireman upon one of its locomotives and running between St. Paul and St. James, in the State of Minnesota.

Third. The defendant denies that the plaintiff has been
19 damaged in the sum of thirty thousand ($30,000) dollars or *of* any other sum or amount whatever by reason of any carelessness or negligence of this defendant, its servants or employés.

The defendant denies each and every allegation, matter, and thing in said complaint contained not hereinbefore specifically admitted or otherwise denied.

The defendant, further answering the complaint of the plaintiff herein, alleges that any and all injuries sustained by the said plaintiff at or about the time named in said complaint, if any injuries were by him sustained at said time, were caused by reason of the carelessness, recklessness, and negligence of the said plaintiff in standing and being upon a certain locomotive engine of this defendant and walking upon the tender thereof at a place upon said tender not provided for that purpose and at a time when the said locomotive and the said tender were in motion; and the said defendant alleges that the said plaintiff was at the time aforesaid in the employ of this defendant as a locomotive fireman, and that the business of such employment required the said plaintiff to go and be upon a certain locomotive engine of this defendant, on or about the day named in said complaint, at the village of St. James, in said State, and that while he, the said plaintiff, was on said locomotive in pursuance of his said business as a locomotive fireman he, the said plaintiff, without the knowledge of this defendant, its servants, agents, or employés, and while the said locomotive and the tender thereto attached were in motion, went upon the *p*utside of said tender and
20 upon a place on said tender not provided for the purpose and without any instructions from this defendant, its servants or agents, so to do, and, being so upon said tender without the knowledge or consent or by the direction of this defendant, its servants, agents, or employés, and *and* while the said engine was being moved carefully and prudently, he, the said plaintiff, because of his, as aforesaid, improper position upon said locomotive and upon such tender, was injured.

Wherefore the defendant demands judgment that this action be dismissed and that it have its lawful costs and disbursements in this behalf expended.

J. M. HOWE.
S. L. PERRIN,
Defendant's Attorneys, St. Paul, Minn.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

E. W. Winter, being duly sworn, says that he is an officer, to wit, the general manager, of The Chicago, St. Paul, Minneapolis and Omaha Railway Company, the corporation defendant in the above-entitled action, and has read the foregoing answer and knows the contents thereof, and that the same is true except as to those matters stated on information and belief, and as to those matters he believes them to be true.

E. W. WINTER.

21 Subscribed and sworn to before me this 3rd day of November, 1890.

S. L. PERRIN,
[SEAL.] *Notary Public, Ramsey County, Minn.*

Answer filed Nov. 3rd, 1890.

OSCAR B. HILLIS, *Clerk.*

22 And afterwards, to wit, on the 13th day of January, A. D. 1891, came the plaintiff, by his attorney, and filed objections to jurisdiction of this court in the words following, to wit:

23 In the Circuit Court of the United States for the District of Minnesota.

JOHN ROBERTS, Plaintiff,
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Defendant.

The above-named plaintiff appears specially herein and for the sole purpose of objecting to the jurisdiction of said court to take cognizance of, consider, or hear, try, or determine said action; and so objects for the following reasons, among others, to wit:

First. Said action is not now and never has been in said court.

Second. Said action was commenced in the district court in and for the county of Scott and State of Minnesota, and the same has never been removed to this court.

Third. That judgment has heretofore been duly rendered and entered in said action in said court in favor of said plaintiff and against said defendant, and that within the past fifteen days and since the filing of the pretended record herein the said defendant has appeared in said action in said State court, and did therein and on the third day of January, A. D. 1891, move said State court to have said judgment, so rendered and entered in said action, vacated and set aside, and that that motion is now pending, upon the merits thereof, before said State court, and the argument
24 thereof has been continued, by consent of both parties thereto until next Saturday, the 17th day of January, A. D. 1891.

Fourth. That by making said motion and said appearance herein in said State court as aforesaid the said defendant has fully submitted itself to the jurisdiction of said State court in this action and thereby has abandoned and waived any and all right which it had, if any, to a removal of the same to this court.

J. L. MACDONALD,
Attorney for Plaintiff for Above Objections Only.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

J. L. Macdonald, being duly sworn, says that he is the attorney for said plaintiff in the action in the State court mentioned in the foregoing objections, and has been such from the commencement

thereof; that the facts stated in said objections as to the entry of judgment and appearance of said defendant therein and the making of a motion therein —, and that said appearance of defendant is general and in no manner special or limited.

J. L. MACDONALD.

[SEAL.] Subscribed and sworn*ed* to before me this 13th day of January, A. D. 1890.

ADOLPH WISLEZEUIS,
Notary Public, Ramsey County, Minn.

[Endorsed:] Objections of pl'ff to jurisdiction of this court. Filed Jan'y 13, 1891. Oscar B. Hillis, clerk.

25 And afterwards, to wit, on the 13th day of January, A. D. 1891, the following proceeding of court was had in the following words, to wit:

26 United States Circuit Court for the District of Minnesota.

Term Minutes, January Term, A. D. 1891, Jan'y 13th, 1891.

JOHN ROBERTS
vs.
THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY. } E. Law. 842.

This day comes the plaintiff, by his attorney, J. L. McDonald, Esq., and notices a motion to strike said cause from the calendar.
T. M., vol. 3, p. 3.

27 And afterwards, to wit, on the 14th day of January, A. D. 1891, the following proceeding of court was had in the following words, to wit:

28 United States Circuit Court for the District of Minnesota.

Term Minutes, January Term, A. D. 1891, Jan'y 14th, 1891.

JOHN ROBERTS
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY. } E. Law. 842.

Plaintiff's motion to strike this cause from the calendar coming on to be heard, the same was fully argued on behalf of the plaintiff by J. L. McDonald, Esq., and on behalf of the defendant by C. D. O'Brien, Esq., duly submitted, and by the court taken under advisement.
T. M., vol. 3, p. 55.

29 And afterwards, to wit, on the 31st day of March, A. D. 1891, the court filed its written order to remand in the words following, to wit:

30 United States Circuit Court, District of Minnesota.

MARCH 31ST, 1891.

JOHN ROBERTS
vs.
CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

J. L. McDonald, for plaintiff; S. L. Perrin & J. H. Howe, for defendant.

NELSON, *J.:*

This is a motion made to remand by the plaintiff.

The correct practice is indicated by Judge Gresham in Gould *vs.* Fuller, 36 Fed. Rep., 609. The petition should be presented to the State court and opportunity given the court to act. In this case the petition was presented to the clerk of the court and filed by him; a certified copy immediately made and given the defendant. The court never had its attention called to the petition.

This is not the proper practice indicated by the statute granting removals from the State court as recognized by the United States Supreme Court.

Motion to remand granted.

(Endorsed:) Order to remand, &c. Filed March 31st, 1891. Oscar B. Hillis, clerk.

31 And afterwards, to wit, on the 30th day of April, A. D. 1891, the following appeal bond was filed in the words and figures as follows, to wit:

32 Supreme Court of the United States.

CHICAGO, ST. PAUL MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Plaintiff in Error,
vs.
JOHN ROBERTS, Defendant in Error.

Know all men by these presents that we, Chicago, St. Paul, Minneapolis and Omaha Railway Company, a corporation duly created, organized, and doing business under and by virtue of the laws of the State of Wisconsin, as principal, and E. W. Winter and R. W. Clark, of St. Paul, Minnesota, are held and firmly bound unto John Roberts, of Scott county, Minnesota, in the sum of two hundred and fifty ($250) dollars, to be paid to the said John Roberts, his executors or administrators; the payment of which said sum, well and truly to be made, the said Chicago, St. Paul, Minneapolis and Omaha Railway Company doth hereby bind itself, its successors and assigns, and the said Winter and the said Clark do hereby bind themselves, their heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with the corporate seal of said Chicago, St. Paul, Minne-

apolis and Omaha Railway Company and the seals of the said sureties.

Dated this 29th day of April, A. D. 1891.

33 Whereas the above-named Chicago, St. Paul, Minneapolis, and Omaha Railway Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse that certain final judgment and order rendered in the above-entitled action by the circuit court of the United States for the district of Minnesota, in the third division of said district, wherein and whereby the said circuit court did remand to the district court of the eighth judicial district of Minnesota in and for the county of Scott, in said State, the action above entitled:

Now, therefore, the condition of this obligation is such that if the above-named Chicago, St. Paul, Minneapolis and Omaha Railway Company shall prosecute its said writ of error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,

[SEAL.] By E. W. WINTER, *General Manager.*

E. W. WINTER. [SEAL.]

R. W. CLARK. [SEAL.]

Signed, sealed, and delivered in presence of—

J. C. CONER.

E. P. H. WEST.

Countersigned:

E. G. WOODMAN, *Secretary.*

34 DISTRICT OF MINNESOTA, *County of Ramsey,* } ss:

E. W. Winter, being duly sworn, says that he is an officer, to wit, the general manager, of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, the corporation principal in the foregoing bond; that the seal affixed to said instrument is the corporate seal of said company, and that the same was executed by his as general manager by the authority of the said corporation.

In witness whereof I have set my hand and affixed my official seal this 29th day of April, 1891.

[SEAL.] S. L. PERRIN,

Notary Public, Ramsey County, Minn.

DISTRICT OF MINNESOTA, *County of Ramsey,* } ss:

On this — day of April, A. D. 1891, before me personally appeared E. W. Winter and R. W. Clark, to me personally known to be the persons who executed the foregoing bond as sureties; and the said Winter and the said Clark, being by me first duly sworn, did each for himself say that he is a resident and freeholder of the State of

Minnesota, and that he is worth in property in said State, over and above his debts and liabilities and exclusive — property exempt from sale on execution, the sum of five hundred dollars.

E. W. WINTER.
R. W. CLARK.

35 Subscribed and sworn to before me this 29th day of April, A. D. 1891.

[SEAL.] S. L. PERRIN,
Notary Public, Ramsey County, Minnesota.

The foregoing bond is approved.

R. R. NELSON, *Judge.*

Appeal bond filed April 30th, 1891.

OSCAR B. HILLIS, *Clerk.*

36 And afterwards, to wit, on May 4th, A. D. 1891, the following citation was filed in the words as follows, to wit:

37 UNITED STATES OF AMERICA, *ss:*

To John Roberts, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington, in the District of Columbia, on the 30th day of May, 1891, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Minnesota, third division, wherein Chicago, St. Paul, Minneapolis and Omaha Railway Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30 day of April, A. D. 1891.

R. R. NELSON, *Judge.*

38 [Endorsed:] Ent. E. law, 842. U. S. cir. c't, Minnesota. Jno. Roberts *v.* Ch'go, S. Paul, M'p'l's & Omaha R'y Co. Citation. Personal service of the within citation is hereby admitted this 30th day of April, 1891. J. L. Macdonald, attorney for said John Roberts. Filed May 14, 1891. Oscar B. Hillis, clerk.

39 And afterwards, to wit, on the 18th day of May, 1891, came the plaintiff in error and filed its assignments of errors in the following words:

40 The Supreme Court of the United States.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, Plaintiff in Error,
against
JOHN ROBERTS, Defendant in Error.

Assignments of Errors.

Now comes the said Chicago, St. Paul, Minneapolis and Omaha Railway Company, and for its assignments of errors in said cause says:

I.

The circuit court of the United States for the district of Minnesota did err in remanding the said cause to the State court, on the ground, as stated by said circuit court, that the petition for the removal thereof from said State court to said circuit court was not properly presented to said State court.

II.

The said circuit court did err in remanding said cause to said State court upon the objections to the jurisdiction filed by the said John Roberts, because the said objections are informal and no written motion to remand the said cause was made or filed in said circuit court.

41 III.

The said circuit court did err in remanding the said cause from said circuit court to said State court.

Wherefore the said Chicago, St. Paul, Minneapolis and Omaha Railway Company prays that the order of said circuit court so remanding said cause from said State court may be reversed.

J. H. HOWE,
S. L. PERRIN,
Attorneys for said Chicago, St. Paul, Minneapolis & Omaha Railway Company, St. Paul, Minnesota.

(Endorsed:) Assignments of errors. Filed May 18th, 1891. Oscar B. Hillis, clerk.

42 UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, Third Division.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 42 pages, numbered consecutively from 1 to 42, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final decision, and all other pro-

ceedings in said cause and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 19th day of May, A. D. 1891.

OSCAR B. HILLIS, *Clerk*,
By —— ——, *Deputy*.

[Endorsed:] United States circuit court, district of Minnesota, third division. John Roberts *vs.* Chicago, St. Paul, Minneapolis & Omaha Railway Company. Return to supreme court.

Endorsed on cover: Case No. 14,891. Minnesota C. C. U. S. No. 1417. The Chicago, St. Paul, Minneapolis and Omaha Railway Company, plaintiff in error, *vs.* John Roberts. Filed October 12, 1891.

Office Supreme Court U. S.
FILED,
NOV 16 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

JOHN ROBERTS.

No. 1417.

BRIEF FOR PLAINTIFF IN ERROR

On Motion to Dismiss or Affirm.

ENOCH TOTTEN,
for Plaintiff in Error.

J. H. HOWE AND
S. L. PERRIN,
of Counsel.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1891.

Supreme Court of the United States.

OCTOBER TERM, 1891.

CHICAGO, ST. PAUL, MINNEAPOLIS, & OMAHA RAILWAY COMPANY, PLAINTIFF IN ERROR,

v.

JOHN ROBERTS.

No. 1417.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

This is a case in which the jurisdiction of the Circuit Court of the United States for the District of Minnesota is the sole matter in issue.

STATEMENT OF THE CASE.

On or about the 15th day of October, 1890, the defendant in error instituted an action against the plaintiff in error in one of the courts of the State of Minnesota to recover for personal injuries received by him while he was employed and doing duty as a fireman on one of the engines of the Company, in consequence of the alleged

negligence of the Company's servants. Damages are claimed in the sum of $30,000.

On or about October 31, 1890, the defendant company, desiring to remove such suit from the State court to the circuit court of the United States, made and filed in such suit a petition for removal, in due form, duly sworn to, and containing such allegations as, on the face thereof, entitled it to such removal into the said circuit court, and also made and filed therewith such a bond as is required by law.

A copy of the record in the case, duly certified under the seal of the State court, was, on the 1st day of November, 1890, issued by the clerk thereof, and this was duly entered in the circuit court of the United States November 3, 1890. On January 13, 1891, counsel for the plaintiff filed in the circuit court his written objections to the jurisdiction of that court (11), which were, in substance, that the action never was in the circuit court and was not removed from the State court; that the State court where the suit was begun had, at that time, rendered a judgment in the cause in favor of the plaintiff and against the defendant, and that on the 3d of January, 1891, the defendant had appeared in the State court and made a motion to set aside said judgment; that the argument of said motion had been, by consent of counsel, continued until January 17, 1891, and was still pending, and that by such appearance and action in said State court the defendant had submitted to the jurisdiction thereof, and had abandoned and waived all right to the removal of the cause, if any it had. On the same day a motion was made in the circuit court by the counsel for the plaintiff to strike the said cause from the calendar. This motion was argued and submitted on the following day (12). On March 31, 1891, the circuit court filed its opinion, in writing, directing that the cause

be remanded. This was done on the ground (13), as appears from the opinion, that the removal petition and bond were presented to the clerk of the State court, who filed them, and immediately issued to the defendant a certified copy of the record, the petition and bond not having been brought to the attention of the State court.

It will be observed that it appears nowhere in the record that the attention of the State court was not invited to the fact that the removal papers had been filed therein. The counsel for the plaintiff says nothing about this fact, if it was a fact, in his written objections to the jurisdiction of the court.

The defendant in the circuit court then brought the cause here by writ of error for review, and the defendant in error now moves this Court to dismiss or affirm, on the ground that a judgment of the circuit court remanding a cause to a State court cannot be reviewed here.

Points and Authorities.

I.

The question raised by the motion to dismiss is whether or not this Court has appellate jurisdiction to review the judgment of the circuit court which remanded the cause to the State court. If it has not jurisdiction, the motion must prevail. The plaintiff in error asserts such appellate jurisdiction, and relies upon the act of Congress approved March 3, 1891, for the authority therefor. It seems to us that a careful examination of that act is the best argument in favor of our position. The fourth section and as much of the fifth as has application to the question now before the Court are as follows:

"SEC. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error otherwise from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, *and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established, according to the provisions of this act regulating the same.*

"SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuits courts direct to the Supreme Court in the following cases:

"*In any case in which the jurisdiction of the court is in issue.*" (26 Stat. 829.)

The jurisdiction of the circuit court and nothing else is in issue here. If the removal proceedings taken were ineffectual to divest the State court of jurisdiction, then the circuit court was without jurisdiction. The circuit court held that these proceedings did not give it jurisdiction, and the writ of error has brought here for review that question, and that question alone. It cannot be said that any other question was in issue in the circuit court. When the "copy of the record in such suit" was entered in the circuit court a "case" was pending therein, and when the objections to the jurisdiction were presented, the jurisdiction of the court was put in issue. If this writ of error is dismissed, this Court must hold that there is one class of cases in which the jurisdiction of the circuit court may be denied without a right of review, while the statute says a right of review shall exist in "any case" where that question is involved.

It is argued in behalf of the motion to dismiss that that

part of the act of 1888 which makes final the orders of a circuit court remanding causes to State courts is not repealed by the act of March 3, 1891. But this cannot be true. The whole system of appellate power is fully covered and regulated by the last-named act. In addition to this, the fourteenth section expressly repeals all acts and parts of acts inconsistent with that act. It is also argued that if there is a power of review it is in the circuit court of appeals. The circuit court of appeals is empowered by the sixth section to review the final decisions of the district courts and the existing circuit courts "in all cases other than those provided for in the preceding section (*i. e.*, section five) of that act," which is the section under which we are proceeding.

It is also argued in support of the motion that the provisions of the act of March 3, 1891, which gives this Court jurisdiction to review the judgments of the existing circuit courts in any case in which the jurisdiction of the court is in issue, were not intended to apply to cases where such jurisdiction depends upon questions of practice; why not? Every proceeding in removal causes may, with propriety, be called a matter of practice. The existence of a few jurisdictional facts are essential to removal, but the act of presenting them to the courts is a matter of practice. Counsel mention, by way of illustration, jurisdictional questions which may arise out of imperfect serving of process. Service of original process is a very important matter to the jurisdiction of every court known to the common law, and we can see no reason why a question of jurisdiction arising out of improper service of process should not be as important as any other jurisdictional question. We look into the statute in vain for any authority or even encouragement for such a distinction.

II.

Coupled with this motion to dismiss is a motion to affirm, which we are told is added because "it is manifest the writ was sued out for delay only, and that the question raised thereby is frivolous, because it has been already decided and settled by this Court." (Bf. p. 7.)

This statement is made upon the assumption that the statute of 1888, making final all judgments of circuit courts remanding causes to State courts, has not been repealed. But no argument is necessary to show the repeal of that provision. In any event, the question here presented is new. It has never before been presented to this Court, and it has never before been considered by it.

It is not deemed *necessary* at this time to say anything touching the soundness of the ruling of the circuit court in the judgment complained of. But it may not be improper to consider it briefly. The question of jurisdiction decided in the court below was:

Did the circuit court of the United States fail to gain jurisdiction because counsel for the defendant did not bring the bond and petition for removal to the attention of the State court?

Waiving for the present the absence of all evidence to show that the removal papers were not formally and in open court brought to the attention of the State court or the judge thereof, we proceed to consider the question itself.

This is a statutory proceeding, and before a cause can be effectually removed the requirements of that statute must be fairly complied with. But nothing more can be required than that the jurisdictional facts shall be sufficiently set out, and the prescribed steps be duly taken.

The court can neither add to nor take from the statute. The statutory provision which regulates the proceedings in this cause is the third section of the act of March 3, 1875, as modified by the act of August 13, 1888. The section is as follows:

"That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a State court to the circuit court of the United States, he may make *and file a petition in such suit in such State court* at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make *and file therewith a bond*, with good and sufficient surety, *for his or their entering* in such circuit court, *on the first day of its then next session, a copy of the record in such suit*, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. *It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit;* and the *said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court.*" [25 Stat. 435.]

A critical examination of this statute will disclose no authority for the ruling of the circuit court. The statute provides that when any party to a suit in a State court entitled to do so may desire to remove such suit he shall take the following steps:

1. He shall make and file his petition containing the proper allegations in such suit at the time prescribed.

2. He shall make and file therewith his bond with good security, conditioned that he will enter in the circuit court on the first day of its next session a copy of the record in such suit, &c., &c.

This is all that is required of him. When he has done this the State court is without jurisdiction to proceed further, and upon entering the copy of the record in the circuit court, the latter court is clothed with complete control of the case. Nothing is said about calling the attention of the State court to such papers. Can there be a more effectual way of bringing a document to the attention of a "court" out of term time than by filing it among the records of that court in the clerk's office? It cannot be so filed without the aid of the clerk. He is the custodian of the records, and it is his duty to make, under the direction of the court itself, a record of everything done in any cause therein pending by the court or any of its officers. The understanding of the law-makers in constructing this statute undoubtedly was, that every State court would take judicial notice of its own records. Further than this, if parties desiring to effect removals were obliged to make such a demonstration in open court as seems to have been in the mind of the circuit court, their proceedings might be delayed unreasonably and far beyond the first day of the next session of the circuit court. In many counties in the Western States courts are not held more than twice a year, and judges, even if judges at chambers were given power to act, could not be found except at great inconvenience and expense. Indeed, there are many reasons which may be suggested why parties should not be required to present their removal papers in open court, and none why they should.

The authorities on this question seem to be conclusive. In the case of the Steamship Co. *v.* Tugman (106 U. S. 118), Mr. Justice Harlan, in delivering the opinion of this Court, says:

"The only remaining question which need be considered is whether the jurisdiction of the State court was in any form restored, after the Company filed its petition and bond for removal. The defendant in error insists that it was. The petition was accompanied by a bond which, it is conceded, conformed to the statute, and was ample as to security. Upon the filing, therefore, of the petition and bond—the suit being removable under the statute—the jurisdiction of the State court absolutely ceased, and that of the circuit court of the United States immediately attached. The duty of the State court was to proceed no further in the cause. Every order thereafter made in that court was *coram non judice*, unless its jurisdiction was actually restored."

In the case of Brown *v.* Nelson (43 Fed. Rep. 614), decided by Judge Shiras in 1890, he reviews all the cases, including Stone *v.* State, and, after quoting from the opinion, states his understanding of that case as follows:

"This opinion, read in connection with the authorities cited therein, declares the rule to be that, if the petition for removal, taken in connection with the record of which it becomes a part, shows upon its face that the cause is one removable under the provisions of the statutes of the United States, then the filing of the petition and bond terminates the jurisdiction of the State court, and causes that of the United States court to attach to the cause. The State court has the right to decide for itself whether the record shows that its jurisdiction has been terminated, and the United States court, in like manner, has the right to decide for itself, when a transcript of the record is filed, whether the record shows that its jurisdiction has attached. Both courts in this matter proceed at their peril;

but the rule given us by the Supreme Court of the United States is that if, upon the filing of a petition for removal and the requisite bond, the record of the case shows that it is a removable cause, then, upon the filing of the petition and bond, the jurisdiction of the State court ceases, and that of the United States court attaches to the case. It is not the presentation of the petition and bond to the court in open session that terminates the jurisdiction, but the filing the same, so that the same become part of the record of the particular suit. As a matter of correct practice, not, however, as affecting the jurisdiction, it is due to the State court that the party seeking the removal should, in due season, present the petition for removal to the State court and invoke its consideration thereof, for it might be that the court might proceed in the cause without actual knowledge of the fact that its jurisdiction has been attacked."

In the case of Wilson *v.* Telegraph Co. (34 Fed. Rep. 561), decided by Justice Field and Judge Sawyer, of the California Circuit Court, the petition and bond for removal were filed by defendant as in this case. The plaintiff objected to the removal because no notice of it had been filed or served on him, and that defendant's appearance had not been insured. The State court denied the petition. The defendant, as was done here, filed certified copies in the United States court, and a motion was made to remand, because unlawfully removed.

Justice Field says:

"The denial by the State court of the petition of the defendants for removal of the action in no respect affects the jurisdiction of the circuit court of the United States if the action was removable, and the bond offered was such as the statute required. The *statute* makes the removal upon the filing of the petition with the necessary bond. The order of the State court directing the removal would have been a proper proceeding; it would have been record

evidence of the court's acceptance of the bond, and in its acquiescence in the transfer of the action from its jurisdiction. But its refusal to make the order could not take from the circuit court its rightful jurisdiction.

* * * * * * *

"And the statute declares that 'it shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the manner as if it had been originally commenced in the said circuit court.' (24 St. 553, c. 373.) 3. As thus seen, no order of the State court or the circuit court is contemplated to transfer the jurisdiction of the action."

In the case of State *v.* Coosaw Min. Co. (45 Fed. Rep. 804), in the South Carolina circuit court, decided in 1891, the court held that the petition for removal of a cause from a State to the Federal courts is part of the record; that when filed in the State court the jurisdiction of the latter ceases, and the former immediately attaches.

This case differs from all others we have found in that the State court not being in session the petition and bond were exhibited to the Judge of the State court in vacation. It does not appear that he made any order in the case. Certified copies were afterwards filed in the United States court. The State court made no order, but seems to have retained jurisdiction. As stated, the Federal court took jurisdiction. The presentation to the State judge in vacation is not material, because he had no power to make an order in vacation, and, if he had, he did not exercise it. So the cause was docketed in the Federal court without any return whatever by the State court, and the removal was sustained.

In Crehore *v.* Ry. Co. (131 U. S. 240), decided in 1889, this Court, by Justice Harlan, reviewed the authorities.

and particularly Stone *v.* State; quoting from the latter case in support of the opening statement of the opinion:

"Upon the filing by either party, or by any one or more of the plaintiffs or defendants 'entitled to remove any suit' mentioned in the first or second sections of the act of March 3, 1875 (18 St. 470), of the petition and bond required by its third section, 'it shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit.' The effect of filing the required petition and bond in a removable case is, as said in Railroad Co. *v.* Mississippi (102 U. S. 135, 141), that the State court is thereafter 'without jurisdiction' to proceed further in the suit; or in Railroad Co. *v.* Koontz (104 U. S. 5, 14), its rightful jurisdiction comes to 'an end;' or in Steamship Co. *v.* Tugman (106 U. S. 118, 122, 1 Sup. Ct. Rep. 58), 'upon the filing therefore of the petition and bond . . . the suit being removable under the statute . . . the jurisdiction of the State court absolutely ceased, and that of the circuit court of the United States immediately attached.'"

See also Railroad Co. *v.* Dunn (122 U. S. 513).

It is submitted that this motion should be denied.

ENOCH TOTTEN,
for Plaintiff in Error.

J. H. HOWE AND
S. L. PERRIN,
of Counsel.

1417
1417

Office Supreme Court U. S.
FILED,
NOV 16 1891
JAMES H. McKENNEY,
CLERK

Supreme Court of United States.

OCTOBER TERM, 1891.

No......

The Chicago, St. Paul, Minneapolis & Omaha Railway Company,

PLAINTIFF IN ERROR.

v.

John Roberts,

DEFENDANT IN ERROR.

J. L. MACDONALD,
Attorney for Defendant in Error.

.....

.....

Of Counsel.

ST. PAUL, MINN.:
JOHN E. DEMPSEY, JOB PRINTER,
1891.

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, *Plaintiff in Error.*
vs.
JOHN ROBERTS, *Defendant in Error.*
No.

Now comes John Roberts, defendant in error in the above entitled cause, through his undersigned attorney, and moves the court, to dismiss the writ of error sued out in this case, and that in case said motion is refused, then the defendant in error moves to affirm the order and decision of the court below.

The ground of the motion to dismiss is, that this writ of error is not only not authorized, but expressly denied by the act of congress, "to determine the jurisdiction of circuit courts of the United States and regulate the removal of causes from state courts;" and that the decision of the U. S. circuit court is final upon the question.

The grounds of the motion to affirm are that the writ was manifestly sued out for delay, as the precise question herein involved has been already decided by this court.

STATEMENT.

This action was brought by the defendant in error, in the state court (the District Court of the State of Minnesota) against the plaintiff in error, to recover damages for a personal injury.

The plaintiff in error did not answer, or appear in the state court, as required by the laws of that state, if it desired to defend therein. It contented itself with simply *filing*, in the office of the clerk of the state court, a petition and bond for removal of the cause to the U. S. Circuit Court, and with having certified copies thereof made by that clerk and filed with the clerk of the U. S. Circuit Court—"only this and nothing more"—and assumed that the cause was thereby removed to the Federal Court.

In this attempted removal the State Court was completely ignored. Neither the petition or bond for removal was presented or submitted to the State Court. All this was done without even the knowledge of the State Court, or even the defendant in error.

At the next term of the U. S. Circuit (the case having been placed upon the Calendar, by the plaintiff in error) the defendant in error appeared specially and objected to the jurisdiction of the Federal Court, and moved the case be remanded to the State Court; which motion was granted and the cause ordered remanded to the State Court.

The reason why the U. S. Circuit Court so order-

ed was (as shown by the decision) that "the petition should be presented to the State Court, and that Court given an opportunity to act."

All of the foregoing facts will more fully appear by reference to the return to the writ of error herein.

ARGUMENT.

This is a motion to dismiss for want of jurisdiction united with a motion to affirm.

We are confident of the correctness of our position, that this Court has no jurisdiction of this cause, at this time, because, as stated, this writ of error is expressly denied by the said act of Congress. But, we insist, that if we are in error as to this, the order of the Court below should be affirmed.

I.

This writ of error is not only unauthorized, but is expressly denied to the plaintiff in error.

Section 2 of the "Act to determine the jurisdiction of the Circuit Courts of the United States and to regulate the removal of causes from State Courts," approved March 3d, 1875, as amended in 1888, by Chapter 866, Vol. 25, U. S. Stat. at Large, provided (in the last paragraph of that section) as follows:

"Whenever any cause shall be removed from any State Court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed, and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed."

This provision of this statute has been already

passed upon this Court, in *Morey vs. Lockart*, 123 U. S. 56; (8. C. 8 Sup. Ct. Rep. 65) and it was there held that, under it, this Court had no jurisdiction to review an order remanding a case to the State Court.

II.

We are advised that plaintiff in error proposes to claim that the above provision of section *two*, was repealed by section 14 of chapter 517 of the U. S. Statues for 1891; the same being "An act to establish Circuit Courts of appeals, and to define and regulate, in certain cases, the jurisdiction of the Courts of the United States, and for other purposes; and that, by the first snbdivision of this section, they are given a right of appeal or writ of error to this Court, in a case of this kind.

We will assume that this is its claim, and consider it.

1. Said section 14 is as follows:

"Sec. 14. That section six hundred and ninety-one of the Revised States of the United States and section *three* of an act entitled "An act to facilitate the disposition of cases in the Supreme Court, and for other purposes," approved February sixteenth, eighteen hundred and seventy-five, be, and the same are hereby repealed. And all acts and parts of acts relating to appeals or writs of error, inconsistent with the provisions for review by appeal or writs of error, in the preceding sections *five* and *six* of this act are hereby repealed.

We submit that this section (14) does not repeal the above quoted provision of section *two* of Chapter 866 of Vol. 25, U. S. Stat. at Large.

It will be noticed that it expressly repeals section

three, and that the above provision denying this writ is a part of section *two*.

2. If Congress intended to repeal that very important provision in section *two*, it would have done it in express terms, as it did with section *three*. It would not have left it in doubt, or to conjecture.

3. If it is repealed at all, it is by implication—by the last sentence of said section 14 of the act of 1891. We insist that it is not so repealed.

Is that provision of section *two*, making the decision of the Circuit Court, remanding a cause to the State Court, final, "*inconsistent* with the provisions for review by appeal or writ of error in sections *five* and *six*" of the act of 1891? We think not.

Section five provides that appeals or writs of error may be taken direct to the Supreme Court (among others) "in any case where the *jurisdiction* of the Court is in the issue," and this is (we understand) relied on by plaintiff in error, as giving it the right to apply for this writ of error.

We claim, as to this, that the jurisdiction here contemplated does not include questions of jurisdiction that are dependent simply upon whether a party has *proceeded regularly*, and by *correct practice*, to give the Court jurisdiction. If it does then an appeal or writ of error will lie, to this Court, direct, from the District or Circuit Courts, in every case where it is claimed that the original process, or the service of the same, is so defective as to fail to aquire jurisdiction over the defendant.

It is manifest, from a reading of the law, that it was not the intention of Congress to thus extend the

right of appeal, and increase the labors of this Court. Section 6 shows this.

4. If the provision of section two, which made the order of the Circuit Court final, has been repealed by the act of 1891, and plaintiff in error has thereby the right to have it reviewed by writ of error or appeal, then it has mistaken it remedy, and *its appeal or writ of error should have been to the Circuit Court of Appeals* instead of this Court.

That section is (so far as relates to this contention) as follows:

Sec. 6. That the Circuit Court of appeals, established by this act, shall exercise appellate jurisdiction to review by appeal, or by writ of error, final decision in the District Court and the existing Circuit Courts, in all cases other than those provided for in the preceeding section of this act, *unless otherwise provided by law*, and the judgments or decrees of the Circuit Court of appeals shall be *final* in all cases in which the jurisdiction is *dependent entirely* upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or *citizens of different states.*"

It is manifest that if the Circuit Court of Appeals was given *final* appellate jurisdiction to review all cases of this kind, it was not intended by Congress that mere questions of practice, such as is the only issue here, could be certified to this Court.

The questions of jurisdiction contemplated in the first subdivision of section 5, were such as would be raised upon a dispute as to whether the *existing facts* were such as gave the District or Circuit Courts jurisdiction of the cause.

5. The question presented by this writ of error is purely one of *practice*; viz: whether or not, in attempting to remove a case from the State to Federal Courts, it is necessary (as held by the Court below) that the petition and bond be *presented* to the State Court, and that Court given an opportunity to act. It is not a question of jurisdiction.

We concede (1) that, upon the presentation of a proper petition and bond, it is the *duty* of the State Court to order the cause removed, and (2) that the jurisdiction of the Federal Court does not depend upon the State Court making this order. But, we insist, that the law requires, and claim that this Court has held (cases cited hereafter) that the presentation of the petition and bond to the State Court (the judge thereof) is a jurisdictional prerequisite.

III.

Should it be held that we were in error, in our claim that this court has no jurisdiction of this cause, upon this writ of error, then we insist that the order of the Court below should be affirmed.

1. We make this motion to affirm, in connection with of our motion to dismiss, under section 5 of rule 6 of this court, and upon the grounds therein specified, viz: that it is manifest the writ was sued out for delay only, and that the question raised thereby is frivolous, because it has been already decided and settled by this Court.

This Court, in *Spies vs. Illinois*, 123 U. S. 131, 164 (citing Arrowsmith vs. Harmoning, 118 U. S. 194, 195; Church vs. Kelsey, 121 U. S. 282) said:

"When under section 5 of our rule 6 a motion to affirm is united with a motion to dismiss for want of jurisdiction, the practice has been to grant the motion to affirm, when the question on which our jurisdiction depends was so manifestly decided right that the case ought not to be held for further argument."

Motion to affirm will be granted, if writ taken for delay only.—*Micas vs. Williams*, 14 Otto 556; *The S. C. Tryon*, 15 Otto 267. Or if the questions of law have already been decided here.—*Swope vs. Leffingwell*, 15 Otto 3.—See opinion in this last case.

2. The question here attempted to be raised, by plaintiff in error, has already been decided by this court.

In the case of *Stone vs. South Carolina*, 117 U. S. 430, in delivering the opinion of the Court, Chief Justice Waite said:

"A State Court is not bound to surrender its jurisdiction of a suit on a petition for a removal until a case has been made which, on its face, shows that the petitioner has a right to the transfer. It is undoubtedly true that, upon the filing the petition and bond—the suit being removable under the statute—the jurisdiction of the State Court absolutely causes, and that of the Circuit Court of the United States immediately attaches; *but still*, as the right of the removal is statutory, *before* a party can avail himself of it, he must show [to the State Court] upon the record, that his is a case which comes within the provision of the statue. *The mere filing of a petition* for the removal of a suit which is not removable, does not work a transfer. All issues *of fact* made upon the petition for removal must be tried in the Circuit Court, *but the State Court is at liberty to decide for itself* whether, on the face of the record, a removal has been effected. If *it decides* against the re-

moval and proceeds with the cause, notwithstanding the petition, its ruling on that question will be reviewable here after final judgment, under section 709."

In the later case of *Burlington C. R & N. Ry. Co. vs. Dunn* (122 U. S. 513; S. C. 7 Sup. Ct. Rep. 1262) this Court again reviewed this question. Recognizing the conflicting opinions of several of the Courts upon the subject it said:

"It must be confessed that previous to the cases of Stone vs. South Carolina 117 U. S. 432, 6 Sup. Rep. 799, and Carson vs. Hyatt, 118 U. S. 279, 6 Sup. Ct. Rep. 1050 (decided at the last term) *the utterances of the Court on that question had not always been as clear and distinct as they might have been.*" * * * * In other cases expressions of a similar character are found, which seem to imply that the State Courts are at liberty to *consider the actual facts* as well as the law arising on the face of the record, *after the presentation* of the petition for removal. At the last term it was found that the question had become a practical one, about which there was a difference of opinion in the State Courts, *and to some extent in the Circuit Courts:* and so in deciding Stone vs. South Carolina, we took occasion to say: 'All issues of *fact* made upon the petition for removal must be tried in the Circuit Court, *but the State Court is at liberty to determine for itself whether, on the face of the record a removal has been affected.*' This rule was again recognized at this term in Carson vs. Dunham, ante 1030, and is in entire harmony with all that has been previously *decided*, though *not with all that has been said in the opinions in some of the cases.* To our minds it is the true rule, and calculated to produce less inconvenience than any other.

The theory on which it rests is that the *record* closes, so far as the question of removal is concerned,